



# BEER INSTITUTE

September 26, 2005

Mr. Francis W. Foote  
Director  
Regulations and Rulings Division  
Tax and Trade Bureau  
Washington, DC 20220

Dear Mr. Foote:

Members of The Beer Institute appreciate the opportunity to respond to the Tax and Trade Bureau's advance notice on a comprehensive list of alcohol beverage labeling issues. The Beer Institute is a national trade association representing domestic and international brewers that produce over 90% of the beer consumed in the United States. The Institute also represents suppliers of ingredients, packaging materials, and other goods and services utilized by brewers. Within the supplier tier of the alcohol beverage industry, domestic and international brewers produce by far the largest number of alcohol beverage containers, labels and advertisements and would be directly affected by all of the proposals in Notice No. 41.

The enclosed comments respond to most of the questions posed in Notice 41 with the exception of issues raised about allergens, which will be addressed in a separate joint comment with other organizations representing alcohol beverage suppliers. As suggested in the Bureau's response to the Beer Institute request for an extension of the comment period, we are likely to supplement these comments with as FDA guidance on allergens and further research is developed on some of the more complex issues raise in Notice No. 41.

We understand that TTB has posed the issues in Notice No. 41 in response to requests from other industry members and advocacy organizations, and we believe that the use of an advance notice is an appropriate means of soliciting broader input. Members of the Beer Institute look forward to continuing a cooperative relationship with TTB in the development of sound labeling policy.

Sincerely,



Jeff Becker  
President



Arthur J. DeCelle  
Executive Vice President & General Counsel

Enclosure

# **Beer Institute Response to Alcohol and Tobacco Tax and Trade Bureau Advance Notice of Proposed Rulemaking**

**TTB Notice No. 41, 70 F.R. 22274, April 29, 2005**

## **Summary**

The Beer Institute believes that the existing Tax and Trade Bureau (TTB) advertising and labeling policies have been carefully developed and updated to provide adequate and truthful product information to consumers. Brewers are now either required or permitted to disclose factual dietary information on labels and in advertising. Light beer, which now constitutes over half of the beer sold in the United States, has been labeled with a mandatory statement of average analysis since 1976. That statement displays the carbohydrate, calorie, protein, and fat content. In 2004, TTB permitted use of the same statement on all alcohol beverage labels.

Other information on alcohol beverage labels is already required or permitted by federal statute and regulations to ensure that alcohol beverages are properly identified and to protect consumers. One essential piece of information that is already mandated or permitted on all alcohol beverage labels is the display of alcohol by volume, a measure that accurately conveys the relative potency of a beverage in the same manner that is used to describe the contents of many other food and beverage products. Consumers understand this information and can readily use it to determine the relative strength of an alcohol beverage. We are not aware of objective research or even strong sentiment among our consumers that would warrant a change in current policy.

In contrast to TTB's carefully considered existing policies, the following changes sought by certain industry members and advocacy organizations would undermine a fundamental mission of TTB, the prohibition against false or misleading labels and advertisements:

- **Display of alcohol content in terms of "fluid ounces" of pure alcohol in the body of a quasi nutritional label---Alcohol is not a nutrient, and TTB's longstanding and straightforward policy of disclosing alcohol by volume should not be subverted by fractional measurements requiring complex calculation. This proposal has no utility for consumers because no standard drink exists currently, nor could one be discerned from the wide variety and range of alcohol content of thousands of brands in the marketplace.**
- **The graphic depiction of a beer mug, a wine glass, and a large shot glass with equal signs between the glasses and fractional numbers inside and below the glasses---This approach is a new variant of "equalization," a hard liquor industry political advocacy message that has no place in labels or advertisements. As shown below, it conveys all kinds of misinformation given the well-known differences among different beer, wine, and spirits products. Further, it is inconsistent with thousands of current drink recipes contained in distiller marketing materials.**

- **The concept of a government sanctioned “standard drink”---This effort is simply a text version of the equalization graphic, and it is equally misleading given the wide variation among distilled spirits products and even among products in the wine and beer category. As indicated by an actual guidance document prepared by one of the petitioners for a new label, innumerable artificial standards would have to be created to achieve the same alcohol content, and those standards would be meaningless and even dangerous if they confuse even a small percentage of consumers.**

TTB should reject these proposals and continue to uphold its tradition of vigilance with respect to labeling and advertising policy. TTB should consider incremental policy changes on matters raised in Notice No. 41 only after thorough research and formal rulemaking on changes that the agency is prepared to recommend based on such research.

## **Introduction**

Most of the substantive questions in Notice No. 41 are not the result of legitimate consumer demand or concern. Their common root is a public affairs, marketing, and political effort of the hard liquor industry to promote a concept known as equalization, which is intended to convince policymakers, consumer groups, medical professionals, and the public that all alcohol beverages are equivalent. TTB should continue to exercise its authority judiciously, as it has in the past, to reject proposals to change sound advertising and labeling policies that are motivated by political or marketplace goals of one particular sector of the broader alcohol beverage industry. Some additional background on this topic is instructive, as some aspects of this debate date back over two decades.

Two decades ago, TTB’s predecessor agency, members of Congress, and other officials were actively petitioned to adopt the concept of a “typical serving” by the Joseph E. Seagram Company, a distiller that held the largest U.S. market share at that time. Not coincidentally, a contemporaneous proposal was pending in Congress to raise the federal excise tax on hard liquor. Bureau of Alcohol, Tobacco and Firearms (ATF)

Administrator Stephen Higgins public response to that effort included the following statement:

I was concerned about the use of the term "typical serving," as that is a somewhat subjective term, with no precise or commonly accepted definition. I was also concerned with the 1¼ ounce quantity of distilled spirits used as a basis for the comparison, since, as I noted then, most drinks involving distilled spirits contain more than 1¼ ounces. In addition, I felt that the equivalency ad, and the inferences that could be drawn from it (including such statements as "a drink is a drink is a drink") with no further qualification, could be misleading to the consumer.

At least two significant developments in this policy area have occurred since Director Higgins made that statement. The "standard serving" now proposed by distillers and published for comment in Notice No. 41 has increased by 20% to 1.5 ounces. And, dozens of new liquor brands have been introduced in the marketplace that are significantly higher in alcohol content than the 40% alcohol by volume figure utilized in the artificial "standard."

As indicated in the background in Notice No. 41, the "serving facts" label proposed for comment in Notice No. 41 has been submitted to TTB directly by at least one industry association. It includes a variant of the graphic that distillers have long promoted in efforts to relax federal and state laws governing spirits distribution and to reduce spirits excise taxes.

The alternative "alcohol facts" label supported by a coalition of consumer advocacy organizations is yet another version of the spirits industry label. As shown below, the standard drink concept displayed on the proposed label is fundamentally flawed when one takes even a cursory view of the manner in which alcohol beverages are actually consumed. The National Consumers League (NCL) / Center for Science in the

Public Interest (CSPI) December 2003 petition was publicly supported by at least one member of the hard liquor industry the same week that the petition was filed with TTB.

The Beer Institute respectfully urges TTB to maintain its tradition of vigilance in fulfilling its responsibilities and exercising its authority to regulate alcohol beverage labels. Congress authorized the Secretary of the Treasury to exercise authority over labeling and advertising in a section of law titled “Unfair competition and unlawful practices,”<sup>1</sup> a clear indication that legislators understood the relationship between competition and the need for sound public policies to protect consumers. Similarly, policymakers, judges, and other officials have long understood the differences among beer, wine, and liquor, which serve as the basis for innumerable laws, regulations, administrative decisions, and judicial opinions dating back to the founding of our Republic.<sup>2</sup>

We believe that the responses below provide an adequate basis for TTB to deny the NCL petition as well as any pending or future applications for label approval that include the formats or additional information proposed for comment in Notice No. 41.

Except where noted, the responses appear in the order that questions were presented in Notice No. 41. The discussions included in the response to the General Questions have substantial relevance to many of the specific questions posed later in the advance notice. The allergen issues addressed in Notice No. 41 will be addressed fully in a separate comment being prepared by several trade associations.

## **Responses to General Questions in Notice No. 41**

**1. Should TTB seek to require mandatory nutrition labeling (that is, calories, fat, carbohydrates, and protein) for alcohol beverage products, or should nutrition information be permitted only on a Voluntary basis?**

**To effectively disclose basic nutrient information, the Beer Institute supports use of a statement of average analysis that TTB has now permitted all alcohol beverage suppliers to use on labels and in advertising. The Beer Institute does not support mandatory nutritional labeling.**

The purposes of statutes and policies governing alcohol beverage labeling differ in several important respects from those governing other beverage and food labels. Any revision of existing rules to permit use of labels similar in appearance to those required under the Nutritional Labeling Education Act of 1990 (NLEA) should, therefore, be undertaken after thorough research and evaluation followed by a formal rulemaking on any specific new format that TTB is prepared to recommend.

Members of the Beer Institute believe that “statement of average analysis,” the term initially utilized by TTB for light beer in 1976,<sup>3</sup> is a more appropriate and neutral description of facts about calories, fat, carbohydrates, and protein. Also, to our knowledge, the statement has not been placed on beer or malt beverage containers in a manner similar to the format of the nutritional labels required by the NLEA.

The Beer Institute supports voluntary disclosure of a statement of average analysis on labels for all types of malt beverages and for all categories and types of alcohol beverages, not just those products labeled “light” or “lite.” The information in the statement of average analysis should be in a format that is legible and easily located by a potential purchaser or consumer. For light beer brands, which now constitute more

than 50% of the malt beverage volume sold in the United States, the Beer Institute supports the existing policy mandating use of a statement of average analysis, which conveys basic nutrient information to consumers.

The development and rapid growth of light (or “lite”) beer in the 1970s led Treasury officials to adopt labeling guidance mandating the straightforward statement of average analysis. The policy has been reviewed and critiqued in two formal regulatory proceedings, both of which concluded with a decision to retain the general agency approach of requiring disclosure of essential factual information. The agency guidance has been updated three times in ATF Rulings 79-17 and 80-3 and TTB Ruling 2004-1, and it is firmly rooted in TTB’s statutory authority.<sup>4</sup> This longstanding policy is current and has been extended to all alcohol beverages. It adequately addresses conditions in the marketplace such as generally heightened consumer interest in the caloric and carbohydrate content of food and beverages.

A discussion of the appropriateness of nutrient information on alcohol beverage labels that appears in the 2005 edition of Dietary Guidelines for Americans states that the most important nutrient information for alcohol beverages is calorie content,<sup>5</sup> further bolstering TTB’s existing policy.

**Key points in the development of TTB’s overall alcohol labeling and advertising policies are instructive to analyze the question of nutritional labeling.**

In considering the broader issue of using nutritional labels for alcohol beverages, the Beer Institute believes that TTB should first consider the purposes of labeling alcohol beverages that are distinct from the purposes underlying nutritional labeling. The Federal Alcohol Administration Act (FAAA) was carefully designed by

Congress to implement the 21<sup>st</sup> Amendment to the United States Constitution by establishing a heavily regulated, stable, and ethical alcohol beverage industry. The original statute included a detailed section subjecting alcohol beverage labels to ongoing scrutiny and regulation along with a more general provision governing advertising. The basic section governing labeling,<sup>6</sup> unchanged since 1935, was novel at the time as a federal consumer protection mandate; and it remains relevant today to prevent consumer deception, to consistently display alcohol content, to prevent notions that government agencies endorse particular products, and for other purposes.<sup>7</sup>

To make certain that labels conform to the Congressionally-mandated standard, a brewer or other producer of alcohol beverages cannot introduce its products into interstate commerce without obtaining “a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary in such manner and form as he shall by regulations prescribe...”<sup>8</sup> Implementing regulations have been updated numerous times over the last seven decades, and substantive agency guidance has been provided on many occasions in response to developments in the marketplace.<sup>9</sup>

Contemporaneous measures in the Internal Revenue Code served the purpose of properly identifying products for taxation. The definition of the term “proof” for distilled spirits<sup>10</sup> and the identification of non-alcoholic beer<sup>11</sup> and other products are examples of labeling provisions of the Internal Revenue Code. Over time, however, the labeling of alcohol content has changed as a result of – among other things – a major distiller’s petition and a report to Congress by the Department of the Treasury and the Department of Health and Human Services stating that alcohol content of distilled spirits should be shown on labels in a manner that was more easily understood by consumers.<sup>12</sup> ATF



responded to the requests of distillers and other agencies in a 1985 interim ruling and a 1986 rulemaking that ultimately required alcohol content to be shown in “percent alcohol-by-volume.”<sup>13</sup>

For beer, current federal law and regulations governing disclosure of alcohol content followed a byzantine path beginning with an outright ban in the FAAA,<sup>14</sup> and ending in a 1995 unanimous decision of the United States Supreme Court holding that the government’s asserted interest in preventing competition among brewers on the basis of alcohol content could be advanced “in a manner less intrusive to respondent’s First Amendment Rights.”<sup>15</sup>

In an extension of the consumer protection function of alcohol labeling regulation, Congress enacted the Alcoholic Beverage Labeling Act of 1988<sup>16</sup> (ALBA). That law did not disturb the basic labeling provisions of the FAAA, but supplemented them in order to remind the American public about the “health hazards that may result from the consumption or abuse of alcoholic beverages” and to “provide a clear, nonconfusing reminder of such hazards” through the “Government Warning” set forth in the law and now included on every alcohol beverage label.<sup>17</sup>

On the regulatory and enforcement front, TTB, its predecessor agencies, industry members, and consumer advocates have devoted significant time and resources to the development of the current regulations and administrative processes for label approval. In addition to numerous rulemaking proceedings and various reports required by the ALBA, TTB engaged in an eight year period of administrative activity and a formal rulemaking that included a thorough evaluation of the use of health claims in labeling and advertising. While many truthful and positive statements about the health

benefits of moderate alcohol consumption for some people are substantiated by credible scientific research, final regulations adopted in 2003 substantially restrict such health-related statements in alcohol labeling and advertising.<sup>18</sup> The preamble to the final rule carefully summarized TTB's interpretation of the relevant statutes and the resulting agency policy.<sup>19</sup>

A specific health claim on an alcohol beverage label or advertisement will be considered misleading unless it is truthful and adequately substantiated by scientific or medical evidence; sufficiently detailed and qualified with respect to the categories of individuals to whom the claim applies; adequately discloses the health risks associated with both moderate and heavier levels of alcohol consumption; and outlines the categories of individuals for whom any alcohol consumption poses risks. This information must appear as part of the specific health claims and, in the case of advertising, must also appear as prominent as the specific health claim. In addition, TTB will consult with FDA as needed, on the use of specific claims on labels.

TTB and its predecessor agencies have been vigilant in exercising statutory authority to restrict disclosure of information concerning health on alcohol beverage labels. That outlook is entirely consistent with the mandate of Congress and sound public policy. TTB should maintain it by barring use of nutritional labels in the absence of careful research and study in the context of broader alcohol beverage regulation. Once that information is developed, a full rulemaking should be undertaken on specific label formats and any proposed new requirements.

**Key elements of the federal alcohol labeling regulatory system and those of federal nutritional labeling requirements are based on different public policy goals.**

As the abbreviated history of label regulation points out, the purposes of alcohol beverage labels are quite different from the purpose of nutritional panels on labels that are required by federal law on other food and beverage products. Food labels present detailed nutrient content and dietary information in the broad context of a healthy diet as

discussed in the following Food and Drug Administration (FDA) guidance on nutritional labeling:<sup>20</sup>

Nutrient content claims describe the level of a nutrient or dietary substance in the product, using terms such as *free*, *high*, and *low*, or they compare the level of a nutrient in a food to that of another food, using terms such as *more*, *reduced*, and *lite*. An accurate quantitative statement (e.g., 200 mg of sodium) that does not "characterize" the nutrient level may be used to describe any amount of a nutrient present. However, a statement such as "only 200 mg of sodium" characterizes the level of sodium as being low and would therefore need to conform to the criteria of an appropriate nutrient content claim or carry a disclosure statement that it does not comply with the claim. Most nutrient content claim regulations apply only to those nutrients or dietary substances that have an established daily value: <http://www.cfsan.fda.gov/~dms/flg-7a.html>. The requirements that govern the use of nutrient content claims help ensure that descriptive terms, such as *high* or *low*, are used consistently for all types of food products and are thus meaningful to consumers. *Healthy* has been defined by a regulation as an implied nutrient content claim that characterizes a food that has "healthy" levels of total fat, saturated fat, cholesterol and sodium. Percentage claims for dietary supplements are another category of nutrient content claims. These claims are used to describe a percentage level of a dietary ingredient for which there is no established Daily Value. Examples include simple percentage statements such as "40% omega-3 fatty acids, 10 mg per capsule," and comparative percentage claims, e.g., "twice the omega-3 fatty acids per capsule (80 mg) as in 100 mg of menhaden oil (40 mg)."

The FDA guidance underscores why the presentation of consumer information on alcohol beverage labels should be different. Applying those concepts to alcohol beverages would create unique problems for TTB:

- Clear potential for consumer confusion exists.
- No daily nutritional value exists for ethyl alcohol.
- Existing law and government-mandated consumer labeling on alcohol beverages are clearly intended to remind consumers of a number of well-known risk factors associated with alcohol consumption or abuse.
- Claims connoting strength of an alcohol beverage are generally prohibited by statute.
- Health claims on alcohol beverages are subject to numerous restrictions.<sup>21</sup>

- The proposed display of alcohol content is different in both substance and measure than the information consumers have become accustomed to reading on other food and beverage labels. (See also, the response to Question 4 below.)

For all these reasons, the application of nutrient labeling requirements to alcohol beverages is simplistic and ill-conceived.

In summary, any effort to introduce new concepts, such as a nutritional panel on alcohol beverage labels is inconsistent with the intent of Congress and sound public policy, both of which are embodied in the existing federal statutory and regulatory system governing alcohol beverage labeling and advertising. TTB should move with extreme care on any rulemaking to mandate or permit nutritional labeling. Any such change should only be considered after thorough research and a formal agency determination that changes in label format or display of additional information would be consistent with the intent of Congress and in the public interest.

**2. Should TTB seek to require mandatory ingredient labeling (that is, a list of all ingredients used to make the product, including processing aids) for alcohol beverage products, or should ingredient labeling be permitted only on a voluntary basis?**

Notice No. 41 sets out the history of the lengthy policy debate over ingredient labeling that ended with the United States Court of Appeals for the District of Columbia Circuit upholding ATF's decision to rescind regulations that mandated partial ingredient labeling.<sup>22</sup>

In the proceedings prior to adoption of the ATF ingredient labeling regulations in 1980, brewers generally supported the disclosure of generic terms of basic brewing ingredients (grains, hops, yeast, and water) and exclusion of substances that do not

remain in material amounts after the brewing process, and are not, therefore, in the final product consumed by the public.<sup>23</sup>

ATF provided the following essential points, accepted by the Court of Appeals, in justifying the decision to rescind the ingredient labeling regulations promulgated in 1980:<sup>24</sup>

Throughout the long history of this issue [ingredient labeling] before the Department one thing appears clear--there is no overwhelming desire on the part of the consumers generally for comprehensive ingredient labeling. An objective review of the record of this case reveals that the vast majority of those commenting have in one way or another been associated with or encouraged by one of the two factions in this dispute. The fact that there has been no sign of grass roots support for the ingredient labeling rules, however, is not alone determinative of the issue...

The Department has also considered the value of the information. As the preceding discussion of the comments points out, there is a serious question as to the usefulness of full ingredient disclosure even if it were required. The substantial transformation involved in the production process means that there is only a strained relationship between the initial ingredients which go into the production process and the ultimate contents of the product to be consumed. Apart from this fact, there is also considerable medical and scientific dispute over the degree to which components of the initial ingredients may survive the production process to cause allergic reaction. Therefore, on this second score, there is also a lack of persuasive evidence that indiscriminate ingredient labeling will provide significant and useful information to consumers generally. Under circumstances where there is neither evidence of a substantial consumer interest in the information, nor clear evidence that the information would provide substantially useful information to consumers generally, the Department concludes that the indiscriminate ingredient disclosure rules of T.D. ATF-66 should be rescinded prior to the effective date. [Emphasis added]

The Beer Institute respectfully submits that agency officials should determine whether these factors have sufficiently changed over the last two decades to warrant revisiting this complex policy area that ATF has already decided. We believe that no change has occurred in the factors cited above that would warrant new regulations.

### **3. What areas need further research and evaluation before TTB can reach decisions on whether and how changes can be made?**

As discussed above, the purposes of government regulation of alcohol beverages go beyond the concepts underlying the NLEA. When TTB's predecessor agency worked through its three-year long rulemaking on health claims in labeling and advertising of Alcohol Beverages,<sup>25</sup> research was conducted to determine how consumers might respond to labels containing so-called directional health claims. Given the breadth of potential changes arising from questions posed in Notice No. 41, no significant change in current TTB policies should occur absent similar research the following areas:

- Usefulness of ingredient labeling;
- Ingredient label implementation feasibility and costs; and
- Consumer confusion predicated on using food-based nutrient labeling concepts on alcohol beverages.

The FDA conducted extensive consumer research over several years before adopting and later modifying the nutrition facts panel that is now required for food and beverages other than those subject to TTB's authority under the FAAA. In addition, the FDA and others continued to test the utility of the label by including questions about it in national nutrition surveys. Thus, a significant knowledge base was applied to the development of the food nutrient label, and to monitoring whether its presence makes any difference in reducing chronic diseases associated with poor nutrition. The label formats proposed by petitioners and published for comment do not reflect the similar use of objective research. They are variations of well-known political and tax policy themes that have no basis in scientific research. TTB and the industry should be certain first, through consumer and scientific research, that ingredient labeling as well as any new

displays of nutritional information or alcohol content will not cloud existing consumer knowledge or undermine existing health and safety reminders.

One area of particular concern highlighted in Notice No. 41 is consumer comprehension of messages communicating standard servings or serving sizes. TTB should examine this very carefully in light of research conducted on consumer perceptions of nutritional labels. A consistent finding in research conducted on the NLEA-mandated labels is that consumers have difficulty translating serving sizes for multiple serving packages and in using the percent of daily value concept (possibly because some values like fat and sodium are more healthful when low, and others like fiber are more healthful when high). For example, when a package of snack food containing multiple servings was provided to consumers, 90% could identify the number of calories in a single serving, but only 37% correctly recognized that the package contained more than one serving. More highly educated consumers and those without coronary heart disease were best able to interpret the serving size information.<sup>26</sup> The concept of serving sizes for liquor bottles could be even more difficult for consumers to discern. Many are labeled in metric volumes and because of difference in alcohol content, many would contain a different number of servings.

Since TTB's authority over labeling and advertising is based on clearly articulated Congressional concerns that are unique to alcohol, different risk-benefit assessments are necessary. The Department of Agriculture and Department of Health and Human Services dealt with some of those challenges in the discussion of moderate alcohol consumption in the 2005 edition of Dietary Guidelines for Americans.<sup>27</sup> That booklet,

however, is detailed and carefully sourced, making the information impractical to disclose in a meaningful manner on a label or in an advertisement.

The findings in NLEA research, basic product knowledge possessed by TTB, and the limited space for explanatory material on a label should raise substantial concern that, in addition to being inaccurate, the concept of “standard servings” of alcohol is wholly misleading to consumers and is not an appropriate policy option.

**4. Are there modifications TTB can make to current requirements regarding alcohol beverage labels to help consumers better understand and benefit from the information on the label?**

Because alcohol beverage labels have been subjected to an ongoing system of pre-review and federal regulations governing alcohol beverage labeling have been reviewed, updated, and supplemented with agency and Congressional guidance numerous times over the last seven decades, TTB should first determine whether the existing system adequately serves the purposes set forth above in the response to Question 1 and only move forward after conducting thorough research on issues presented in the response to Question 3.

**“Standard serving size” for alcohol beverages and measures of absolute alcohol are misleading.**

One new proposed addition to each of the specific labels published for comment in Notice No. 41 is the display of alcohol content in fractions of an ounce of absolute alcohol in an arbitrarily defined standard serving. The Beer Institute strongly believes that TTB should reject any proposal to allow statements of absolute alcohol in fractional fluid ounces and any statement that suggests the existence of a “standard drink.” These



proposed methods of displaying alcohol content information and attempting to formalize a new industry standard are fundamentally flawed.

Display of alcohol content information stated in percentage by volume is already either mandated or permitted on all alcohol beverage labels. The additions to labels proposed for comment in Notice No. 41 are not a practical means of communicating useful information to consumers. As compared to labeling beverages in terms of their alcohol concentration, or percent alcohol by volume, labeling beverages in ounces of absolute alcohol is misleading because beverage categories, types, and packages vary in alcohol potency. To achieve the informational goals of TTB and various petitioners, a consumer must compare disparate serving sizes for each product, number of servings in a container, *and* amount of pure alcohol contained in the stated serving size. Furthermore, the use of a standard serving size is not consistent with the manner in which many alcohol beverages are actually consumed.

Label information of this type would be used by consumers for comparison purposes with the other forms of alcohol they drink. Since many, if not most, consumers on occasion drink different forms of alcohol, TTB must assume that at least some consumers will compare the alcohol content displays on beer, wine, and spirits labels and make decisions based on that information. Furthermore, TTB is aware that some industry members have already utilized comparative advertising along the lines of the proposed labels in Notice No. 41. New policies could have a dramatic effect on labeling and advertising practices, underscoring the importance of the very vigilant approach traditionally taken by TTB in these important areas.

The following example would occur in comparing labels with the format shown in Notice No. 41: A consumer views labels on a hard liquor container and a gallon wine container. The following six numbers must be compared, four of which are presented in fractions: 17 drinks in a 40 proof liquor container, if using a 1.5 fluid ounce serving, which contains 0.6 ounces of absolute alcohol and 25 servings per a wine container, if using a 5 fluid ounce serving, which contains 0.6 ounces of absolute alcohol. Add the traditional percentage by volume or proof, and there are eight different numbers. Add a third beverage, and twelve *different* numbers must be deciphered.

In contrast, consumers are familiar with the concept of concentration by volume on alcohol beverage labels as well as other food and beverage labels, and that number is much easier to compare for those who want to know the relative alcohol concentration of beer, wine, and spirits. These are direct, obvious, and simple comparisons to make and to apply in everyday situations. TTB, as well as other federal agencies, have utilized this method for decades.

The matter is further complicated by the fact that, although “serving size” is fairly standard for beer, it is not consistent for all brands and packages. Significant differences can exist in the alcohol content of beer alone, although the range is generally between 4 and 5.5% alcohol by volume. That range varies more dramatically for other alcohol beverages. Different measuring jiggers for hard liquor contain anywhere from 1 to 3 fluid ounces, for example, and most mixed drinks are “free poured” without the use of a shot glass in any case. A serving size is not marked on wine glasses, and their capacity can vary dramatically. Moreover, very few people could define a standard serving for ports, sherries, liqueurs, fortified wines, and other beverages that are not as popular, but are

commonly consumed. In fact, the subject of serving sizes with respect to alcohol beverages has itself never been the subject of adequate research.

The “serving size” and “ounces of absolute alcohol” approach is an arbitrary abstraction that equates to the false and misleading “spirits = wine = beer” oversimplification that the TTB also published for comment. In addition, it is entirely unnecessary. Rules already exist for providing the nutritional information on calories, protein, carbohydrates, and fat on alcohol beverage labels. TTB Ruling 2004-1 already requires a statement of average analysis in connection with calorie and carbohydrate claims. There is no reason whatsoever to add ounces of alcohol per serving to that analysis when information on alcohol by volume is already present and is conveyed clearly and effectively.

Alcohol content is the fundamental reason that Congress has given TTB authority over the labeling of beer, wine, and spirits. The FAAA requires statements of alcohol content for most wine and all liquor,<sup>28</sup> and TTB has issued formal regulations making alcohol content statements optional for beer.<sup>29</sup> Federal law and regulations have long required such statements to be expressed in percentage of alcohol by volume. The Beer Institute is not aware of any consumer demand or need to create a completely new method of displaying alcohol content.

The TTB proposal would result in labels containing an artificial serving size and two different presentations of alcohol content on the same container. No clear analysis or rationale has been offered to show how that additional information would be useful and not misleading to the public. Moreover, no information provided by TTB shows or suggests that the existing alcohol by volume measurement is not understood by

consumers when it has been in use for decades. Allowing suppliers to include two different types of alcohol content on labels and in advertising is likely to mislead consumers in a manner that TTB is obligated to prevent as discussed in detail in our response to General Question No. 1. In addition, permitting all forms of alcohol to be characterized in simple fluid ounces of absolute alcohol, without regard to the significant differences in concentration of alcohol or the time and manner of consumption, is false and dangerous.

**Consumers are familiar with and understand percentage measurements.**

In addition, the mock labels published in Notice No. 41, if utilized in the marketplace, could lead to comparative advertising in a manner that directly conflicts with the longstanding and prudent federal and state policies prohibiting marketing that focuses on alcohol strength. Again, careful study is needed before altering regulations in a manner which could mislead consumers or unintentionally undermine other legislative and regulatory goals.

Consumers are accustomed to seeing information on food and beverage labels provided in straightforward, percentage measurements. The NLEA, for example, includes a provision that beverages containing fruit and vegetable juice are required to be labeled with a prominent statement of “the percentage of such fruit or vegetable juice contained in the food...”<sup>30</sup> A variety of other food and beverage product labels (e.g. milk and other dairy products) include similar statements. Indeed, TTB has even approved alcohol beverage labels that include phrases, such as “made with 100% pure fruit juice concentrate.”

The following FDA regulation requires alcohol content labeling in percentage of alcohol by volume for over-the-counter (OTC) drug products intended for oral ingestion:<sup>31</sup>

(a) The amount (percentage) of alcohol present in a product shall be stated in terms of percent volume of absolute alcohol at 60 °F (15.56 °C) in accordance with § 201.10(d)(2) of this chapter.

(b) A statement expressing the amount (percentage) of alcohol present in a product shall appear prominently and conspicuously on the “principal display panel,” as defined in § 201.60 of this chapter. For products whose principal display panel is on the immediate container label and that are not marketed in another retail package (e.g., an outer box), the statement of the percentage of alcohol present in the product shall appear prominently and conspicuously on the “principal display panel” of the immediate container label.

Another existing alternative that properly illustrates the important differences in alcohol concentration is a United States Department of Agriculture measurement developed to show grams of alcohol per ounce of liquid. A chart showing this measure for various types of alcohol beverages is attached as Exhibit A. It also could provide an accurate measure to compare the different concentrations of alcohol found in various alcohol beverages, although this too requires further study as to its applicability to labels and advertising and whether consumers will readily understand and can utilize this alcohol content format. Concentration is important, not only for the relative potency, but also for the caloric content as pointed out in the comparative chart for alcohol beverages in the Dietary Guidelines for Americans, which lists calories per ounce for six types of alcohol beverages. That chart shows the role that alcohol plays in the calorie content of each beverage.

Obviously, there are a number of ways that alcohol content can be expressed. Any alternative to a clear statement of alcohol by volume in an “alcohol line” in the body of a serving facts panel should be carefully studied and subjected to a full notice and comment rulemaking. Before proceeding with any new concept, such as measurement in grams or fluid ounces, on the “alcohol line” of a serving facts panel, TTB should first determine and clearly articulate the purpose for that information and specifically detail why the chosen method is better than alcohol by volume, why it is beneficial and not misleading to the consumer, and why no other method should be permitted.

**The labels proposed for comment in Notice No. 41 conflict with existing state law.**

The label formats proposed for comment in Notice No. 41 also conflict with state laws. State laws and regulations will be impacted by stating alcohol content in fluid ounces. Many states have provisions specifying the manner in which alcohol content information can be shown on labels. Most deal with the percentage of alcohol, either by weight or by volume. For example, Arkansas law states clearly that “...the alcohol content must be shown as alcohol by volume. The alcohol content information may not be made in a misleading or false manner...”<sup>32</sup> In Mississippi, the law says “It shall be unlawful...to sell any such commodity with any statement in conflict with the provisions of this section, with reference to the alcoholic content of such beverage or beverages, except that a statement of alcoholic content may be expressed on any light wine or beer label in terms of volume or weight.”<sup>33</sup> Oregon requires that “all malt beverages exceeding 6% alcohol by volume must show in conspicuous type on the label or container the

alcoholic content by volume."<sup>34</sup> Thus, use of an "Alcohol Facts" or "Serving Facts" panel, as shown in Notice No. 41 will put companies at risk of violating state laws.

Presidential executive orders and public statements dealing with federalism stress the need for federal agencies to provide opportunities for input from state officials on issues with implications for state policy.<sup>35</sup> TTB has taken those directives seriously, making significant and laudable efforts to involve state alcohol beverage control officials in ongoing reforms of the label approval process. One central goal has been to ensure consistency in labeling wherever possible given the states' general and specific grants of authority under the 21<sup>st</sup> Amendment and the FAAA. The labels published in Notice No. 41 conflict with existing state laws and regulations. Thus, the progress toward greater uniformity in alcohol beverage labels will be set back, a development that would not be helpful to anyone.

**5. Should TTB harmonize its alcohol beverage labeling regulatory requirements with those of other major producing nations, such as the Member States of the European Union, Australia, and Canada, and with regulatory schemes of other Federal agencies, such as the Food and Drug Administration (FDA)? If so, how would that be best done?**

Because beer is a perishable product and shipping costs are relatively high, domestic brewers have increasingly granted licenses to brewers in other nations to produce, bottle, and distribute their brands. The labeling requirements for American brands produced overseas are addressed by the respective licensees, who are familiar with their national requirements governing labeling. The United States is itself a major market for imported beer. To the extent that TTB can facilitate label harmonization efforts with products of other nations destined for the United States, potential barriers to free trade can be reduced or eliminated. The unique history and overriding purposes and

policies of American alcohol beverage regulation, however, must be seriously considered. Further, no changes should occur without formal rulemaking.

**6. Are consumers likely to derive benefits from more specific information on alcohol beverage labels, and, if so, are those benefits sufficient to warrant the economic costs associated with such revisions?**

The Beer Institute believes that existing labeling regulations adequately provide the information that consumers need to make an informed purchase and to consume the product accordingly. The labels also consistently convey the mandatory government warning reminding consumers of well-known risks of alcohol abuse. Further, existing research on the NLEA-mandated labels indicates that consumers can generally identify calorie and carbohydrate information. That information is already available on most beer labels, and could be made available on all alcohol beverage labels under existing TTB policy extending the use of statements of average analysis.

TTB must also consider that over 90 percent of beer is sold in smaller containers (primarily 12 oz. bottles and cans) than most wine or hard liquor products. As a result, the smaller size of available labeling space and significantly greater packaging costs for beer require further study by TTB and further industry input if TTB proposes any significant format changes to existing label regulations.

If TTB determines that nutritional labels warrant further study, one relevant concept studied and ultimately adopted in FDA guidance is the dual declaration for foods that require additional preparation, such as addition of milk to cereal. Since spirits products are frequently consumed with fruit juices, sodas, or other mixers, a dual



declaration would be helpful in making valid comparisons among various types of drinks as they are actually consumed.

**7. What should be the agency's priorities in deciding which changes to make on alcohol beverage labels, that is, which changes are most important and which are least important?**

With enactment of the Food Allergen Labeling and Consumer Protection Act, Congress has now mandated the addition of a statement concerning allergens to food and beverage labels. Members of the Beer Institute will certainly comply with that law, and TTB should promptly promulgate regulations to implement this statute as it has in the past when dealing with sulfites and other substances that trigger an allergic reaction in some consumers.

TTB should also complete its final plain language revisions to regulations governing malt beverage advertising and labeling so that subsequent labeling regulatory projects are conducted with a common understanding of the overall regulatory system for advertising and labeling. Concurrently, TTB could begin some of the research projects outlined in our response to Question 3 to determine whether or not further changes are warranted.

As outlined above, the Beer Institute does not believe that TTB should adopt or further consider the concept of a standard serving size, particularly the overly simplistic equalization graphic and the exceedingly complex fluid ounce measures of absolute alcohol content. If TTB determines that it must study these issues further, some of the more fundamental research projects outlined in our response to Question 3 could be undertaken to determine whether or not further changes in existing regulations are necessary or helpful to consumers.

## **8. Should any new labeling requirements apply equally to advertisements?**

A straightforward mandate of the FAAA is to prevent the use of statements in advertising that are “inconsistent with any statement on the labeling of the products advertised.”<sup>36</sup> Longstanding TTB regulations restate this provision generally.<sup>37</sup> Additional regulations make it clear that the principle applies to packaging, inserts, or similar materials.<sup>38</sup> An advertisement that uses a label or label facsimile that is not approved in the statutorily-mandated TTB process could be misleading. The Beer Institute believes that the existing statute and regulations adequately protect consumers by ensuring that only the approved label should appear in advertising and that no statement that would be prohibited as false or misleading on a label may be used in advertising.

## **Carbohydrate and Light Beer Issues**

### **1. Should TTB promulgate regulations that define “low carbohydrate” for alcohol beverage products as containing no more than 7 grams of carbohydrates per standard serving size, as specified in Ruling 2004-1? Why or why not?**

As pointed out in Ruling 2004-1, TTB adopted a “conservative standard” of 7 grams or less in a 12 oz. serving for use of the term “low carbohydrate.”<sup>39</sup> Notice No. 41 acknowledged the pending FDA rulemaking on low carbohydrate claims, and once it is complete, some of the basic issues on this question should be clarified, and TTB could consider raising the existing threshold. Given the statutorily mandated allergen disclosures, the apparent waning consumer interest in low carbohydrate products, and other labeling matters facing TTB, the Beer Institute believes that existing guidance in

Ruling 2004-1 is adequate at this point in time and could be revisited after completion of the pending FDA rulemaking.

**2. Should TTB continue to prohibit use of the terms “effective carbohydrates” and “net carbohydrates” on labels and in advertisements? Why or why not?**

TTB should follow the rationale set out in Ruling 2004-1, and continue to prohibit the use of variants of basic nutrient descriptions, such as those are commonly used in proprietary diets, related books and tapes, innovative medical research, and other formats. Such terms are not likely to be properly understood by large segments of the consuming public without significant additional information, some of which may be highly technical or even theoretical. The potential also exists for a stream of applications for label approval seeking to use new terms from popular diets and other sources. TTB would then be in a difficult role of constantly analyzing new descriptive terms and determining whether they constituted health claims or were false and misleading.

**3. Should TTB wait for the conclusion of FDA's regulatory decision-making process for the use of the term “low carbohydrate” for food and beverage products FDA regulates before issuing regulations on a low carbohydrate standard for alcohol beverage products?**

The Beer Institute believes that TTB should maintain its existing policy and reconsider it, if necessary, in light of the pending FDA regulatory project.

**4. How should TTB define the terms “low calorie” and “reduced calorie” for alcohol beverage products? Should we propose standards for these claims consistent with FDA's standards? Should we develop our own alternate set of standards and, if so, what should they be?**

See response to Question 5 immediately below.

**5. Should TTB establish regulations for the use of the terms “light” and “lite” on alcohol beverage labels? If so, should we propose standards for these claims consistent with FDA's standards? How would these standards apply to products for which the term “light” is part of the standard of identity (such as “light whisky” or “light wine”)?**

TTB Ruling 80-3, as modified by Ruling 2004-1, covers the use of the terms “light” or “lite” adequately for malt beverages. As indicated in the response to earlier questions, the basic agency guidance on malt beverages has remained substantially the same for almost three decades with no indication that consumers have been misled or desire an alternative standard. The light beer category has grown to more than 50% of the total volume of beer sold in the United States during that period, and consumers have been adequately informed of caloric and carbohydrate content by the statement of average analysis.

The basic premise of TTB’s longstanding approach to express carbohydrate and caloric claims is sound. Such claims, when made about specific alcohol beverages, should be factual and based on proper testing to ensure accuracy. When made in a comparison, they should be accurate and properly qualified. No claims should disparage competing products. These matters are adequately covered for malt beverages in Rulings 80-3 and 2004-1. Both documents are firmly based in the broader principles of the FAAA and 27 CFR Part 7. Existing TTB regulations governing health claims in labeling and advertising provide further guidance on more specific dietary claims.

Ruling 2004-1 also extends to other beverage categories. A relatively small volume of wine and liquor is labeled “light” and, as discussed throughout this comment, no standard serving size for those products exists. In the case of hard liquor, the alcohol content and therefore the caloric content vary widely. Use of mixers and other factors

also influence the caloric and carbohydrate content of the beverages as actually consumed. For products other than malt beverages, TTB should build on the research suggested above to determine whether any additional requirements are necessary to regulate carbohydrate and calorie claims for other alcohol beverage categories.

### **National Consumers League / CSPI Petition and Related Issues**

#### **1. Should alcohol beverage containers bear an Alcohol Facts label similar to the one presented in the CSPI petition? Why or why not?**

The “CSPI petition” actually appears to be the work of the National Consumers League (NCL) and an extension of prior public statements and publications produced by that group. A review of information currently available on the NCL web site indicates that its own current guidance on alcohol consumption does not utilize a consistent “standard” for beer, wine, and spirits suggested on the proposed alcohol facts label. This underscores the potentially misleading nature of the label information that the NCL petition proposes in terms of a “standard drink” and presentation of absolute alcohol.

In a publication entitled, “Alcohol: How It All Adds Up,”<sup>40</sup> the NCL has six different “standard drinks” with five serving sizes. The standard servings were adjusted because of variations in alcohol content among different products, all of which are commonly consumed. One of those servings is a 9 oz. serving of “strong beer (malt liquor),” which is not a standard the Beer Institute has been able to identify anywhere else. In an apparent oversight, no comparison of light beer is included, even though it accounts for more than half of the beer volume currently sold in the United States. If light beer were included, the NCL comparison would have to include a seventh serving size and graphic. Also, no comparative information was available for liquor above 40%

alcohol by volume, even though some of the fastest growing brands would fall in that category.

Based on the demonstrated discrepancies, omissions, and lack of current marketplace information alone, TTB should simply deny the NCL / CSPI petition and bar use of the label that the organization proposed.

**2. Should such a label include an ingredient list as suggested in the CSPI petition?**

Please see response to General Question 2 beginning on page 11 of this comment.

**3. Should the label be voluntary or mandatory?**

The Beer Institute respectfully submits that TTB should not even reach the question of voluntary or mandatory use of the proposed “Alcohol Facts” label. It should not be approved for use by any industry member. TTB should utilize its full authority to prevent the use of the proposed label on the basis that the selected Dietary Guidelines quotation is a health claim and the graphic and the measure of absolute alcohol content are misleading within the meaning of the FAAA. The health claim issue and the alcohol content measure are discussed above in the response to General Questions 1, 4, and 6.

**4. If mandatory, should there be any exemptions from the alcohol facts and ingredient labels, such as for small businesses or for small containers?**

Please see response to Question 3 immediately above.

**5. Should current alcohol content statement labeling requirements be expanded to cover wines with an alcohol content of 14 percent alcohol by volume or less and malt beverages?**

The Beer Institute believes that the existing TTB regulations governing display of alcohol content on beer labels should remain voluntary. With respect to advertising, the issue of statements of alcohol content for malt beverages must still be reconciled with the text of the FAAA.<sup>41</sup>

The alcohol content of most beer is in a very narrow range, and consumers are generally aware of that fact. A weighted average of the alcohol content of the top 20 brands of domestic and imported beer based on 2004 sales data is 4.5 percent alcohol by volume.<sup>42</sup> Those brands account for 78.1 percent of the beer volume sold in the United States in 2004.<sup>43</sup> Flavored malt beverage brands, none of which is in the top 20 brands, are required to display alcohol content by volume.

**6. What would be the costs associated with mandatory alcohol facts and ingredient labeling to the industry and, ultimately, the consumer?**

Accurate cost estimates that would be incurred under a new mandatory labeling requirement would vary substantially with the location of the additional information and whether or not brewers would have the option of adding the information to outside packaging as opposed to placing it on every individual container. If a relatively large, new label were required on each container, the initial costs for large and small brewers would be substantial, as new labeling equipment for bottles would have to be purchased along with billions of additional labels annually. Installing or modifying equipment to accommodate a back label on existing bottling lines would cost millions of dollars cumulatively. New equipment or modifications would have to occur at bottling lines at

20 breweries with a capacity of 3 million barrels or more, some of which have already have limited capability to produce bottles with back labels. At least 52 smaller brewers that have at least one bottling line would also have to purchase new equipment or modify existing equipment to include a back label. Those costs could be substantially reduced if any new required information could be placed on outer packaging, which is also more likely to be seen by consumers at the point of purchase.

**7. How might consumers benefit from such a label?**

As indicated in our response to several related questions, the Beer Institute does not believe that consumers would benefit from the proposed label. The Beer Institute respectfully urges TTB to build a sound research base before proceeding further on any fundamental changes in labeling policy.

**8. As a consumer, how much extra would you be willing to pay for alcohol facts and ingredient labeling information?**

While this question is not directed at industry members, the Beer Institute notes that consumers can already obtain a wide range of information at no cost from existing web sites, toll free numbers, and similar sources. The additional costs associated with new or larger labels that would be needed to accommodate the information in the labels published for comment would inevitably lead to higher consumer prices, as the question suggests.



**9. Are there alternatives to mandatory alcohol facts and ingredient labeling for alcohol beverages? For example, if a label lists a Web site or telephone number where a consumer could obtain such information about the product, would this be sufficient?**

Over 300,000 contacts to consumer hotlines and web sites maintained by brewers were recorded in 2004.<sup>44</sup> These sources are capable of providing detailed and accurate information on a substantial range of issues that might interest particular consumers. Contact information already appears on billions of containers produced each year by large and small brewers, so no need exists to address this issue in federal regulations.

**Serving Facts Issues**

**1. Should alcohol beverage containers bear a Serving Facts label similar to the one presented in this section? Why or why not?**

The serving facts format is even more problematic than the alcohol facts label discussed above. In addition to the misleading presentation of alcohol content and standard serving size, the serving facts panel includes graphics that require extensive calculations to properly interpret. Even if a consumer successfully completes the calculations, the results do not reflect real-life consumption habits or recommended servings prepared and publicized by the hard liquor industry. Thousands of currently available recipes on web sites, in magazines, and even in control state agency publications exceed the actual product volume and the amount of absolute alcohol in the standard that would appear on the proposed serving facts panel.

There is a wide range of alcohol content in drinks containing hard liquor. The alcohol by volume of some liquor brands is as low as 6 percent and for others it is over 80%.<sup>45</sup> Spirits are typically poured in quantities much larger than 1.5 ounces, and except

for shots intended for consumption in a single swallow, the shot glass portrayed in the proposed serving facts graphic is not a typical serving as it is understood by the consumer. A quick look at the alcohol levels in the following common liquor recipes (taken from “The Craft of the Cocktail”, Dale DeGroff, Clarkson Potter 2002) further supports this fact:

1. Extra-dry Martini: 3 ounces of gin plus dash vermouth
2. Fancy gin cocktail: 1 *wineglass* of gin
3. Dirty Martini: 3 ounces of gin
4. Vodkatini: 3 ounces of vodka
5. Sour apple martini: 2 ounces citrus vodka, .5 ounces sour apple “pucker”, .5 oz cointreau.

Included with this comment as Exhibit B is a compilation of other industry and government publications along with examples from industry-sponsored web sites containing numerous drink recipes calling for more than 1.5 ounces of spirits. Many have 2 ounces or more, a significant departure from the “standard drink” portrayed graphically or described in the labels proposed in Notice No. 41. Moreover, 1.5 ounces of spirits containing 30% alcohol by volume is simply not “equal” to 1.5 ounces of spirits containing 50% alcohol by volume. Just within the “spirits” category, great diversity exists in alcohol content. The proposed “facts” presented in the proposed serving facts label are, therefore, not correct for the particular products or for the recipes provided by liquor manufacturers.

Additionally, while written versions of other cocktails often call for 1.5 or 2 or 2.5 ounces of liquor, in real-life bar situations or at home, liquor is generally “free-poured” without using a jiggers or shot glass. In addition, “over pours” are common practice even when a jigger or shot glass is used. This practice often results in 2-3 ounce pours of

simple popular mixed drinks such as Rum & Coke, Gin & Tonic, Bourbon & Branch, or Whiskey on the Rocks, even if the “recipe” calls for only 1.5 ounces of hard liquor. Even the shot glasses that purport to provide for a standard pour vary in size from 1 ounce to several ounces, and many bear no measurements or indications of capacity. Once again, common practice should be a major consideration before changing federal policy in this area, not a political or market-based motivation of certain industry members.

The Century Council, a public policy organization created and funded by the hard liquor industry, includes in its educational materials a list of commonly consumed alcohol beverage products and their respective alcohol content, which is stated in fractions of an ounce.<sup>46</sup> It indicates that a 12 ounce serving of light beer generally contains 0.4 ounce of alcohol while the amount for regular beer is 0.5 ounce. The same indicator includes the following alcohol contents for popular mixed drinks: margarita--0.7 ounce; Manhattan--0.74 ounce; Long Island Ice Tea--0.8 ounce; popular liqueurs--0.25 ounce. Said another way, it would take roughly two 12 ounce bottles of some light beers to have roughly equivalent servings of alcohol to one Long Island Ice Tea, which also would require a bartender to pour five different forms of liquor perfectly to arrive at exactly 0.8 ounce of alcohol. When one compares the same two light beers to two shots of 100 proof premium vodkas or bourbons, or 190 proof pure grain alcohol, the suggestion that “a drink is a drink” is even more misleading.

**2. Should such a label include a definition of a “standard drink” and if so, how should a “standard drink” be defined?**

**A “standard drink” as portrayed in the serving facts label published in Notice No. 41 does not represent the typical or “standard” way in which alcohol beverages are consumed and does not accurately represent the “standard” or most common alcohol strength for all drink types.**

The “standard drink” is a political concept used by members of the hard liquor industry to undermine the tax and regulatory structure that has been in place in our nation for two centuries. The idea of a standard drink has also been used for competitive purposes in product comparisons. The figures (1.5 ounce of liquor at 40%, 12 ounces of beer at 5%, and 5 ounces of wine at 12%) have been specifically selected to show one particular instance where the amount of alcohol may be equal, but only by using one artificial number for alcohol content as the example. That number would not be accurate for the contents of most containers on which the graphic or text would appear and would therefore be a false message in the context of a container label. TTB should not assist in perpetuating such a message. Labels proposing the addition of such information should be rejected by TTB on the basis that they would be false and misleading as would any advertising that used similar themes or information.

Members of the public consume beer, wine, and liquor in a wide variety of circumstances. In the lengthy rulemaking process devoted to the matter of health claims, TTB recognized that product labels or advertisements are generally not an effective substitute for the unique considerations that each individual should balance when deciding to consume beer, wine, or liquor. Many sources exist to communicate that information. For example, the federal government’s Dietary Guidelines for Americans,<sup>47</sup> includes several pages reminding consumers of the well-known risks and benefits of consuming alcohol beverages. That information is also regularly updated and presented in the broader context of a healthy diet and lifestyle. The guidelines do include a comparison of alcohol servings in a table addressing moderate consumption, but nowhere

do the guidelines suggest that the numbers constitute a “standard drink” or that all drinks are equal.

Beyond the factual problems with the proposed serving facts label, there are substantial cultural, political, economic, and historical reasons why beer, wine, and spirits have been understood, defined, and treated differently by federal and state legislatures, regulators, and the industry itself since the country’s birth. These well-founded distinctions should not be eroded. Our responses to the General Questions include further background on the presentation of alcohol content and other issues that are common to the serving facts and other label formats proposed in Notice No. 41.

**3. Should such a label include graphic icons similar to, but not necessarily limited to, the one presented in this section? Why or why not?**

***The proposed graphic depicting a “Drink is a Drink” is false and misleading, and any application proposing to utilize such a graphic should be rejected pursuant to TTB’s clear authority to prohibit such statements or inferences on alcohol beverage labels.***

Not only is the substance of the proposed serving facts label false and misleading, but the glass graphics are even more egregious. If the glass sizes printed on a label were proportional to the serving sizes indicated, the “shot glass” would be 12.5 percent of the size of the beer mug and the message communicated would be quite different. In fact, it might not be recognizable on a smaller container label.

The graphics shown on the labels proposed in Notice No. 41 will thoroughly mislead a significant number of consumers who will almost certainly perceive the pictures and information differently. As indicated in the introduction to this comment,

the graphic is part of a struggling attempt to standardize and commercialize liquor as an equivalent to wine and beer, which is factually and commercially false and misleading.

The proposed graphics simply are open to many interpretations. For example, consider the picture of the “shot glass” with “.6 oz alc” inside the glass and “1.5 oz Spirits” beneath the glass. Does this picture mean that there are three drinks of alcohol in a standard shot glass? Or, since a “shot glass” is often only 1 fluid ounce and the pictured glass is almost ½ the height of the beer mug one might question whether this is a picture of a Whiskey Rocks glass, and not a shot glass at all?

**4. Should the label be voluntary or mandatory?**

The serving facts label should not be used at all.

**5. If mandatory, should there be any exemptions from the serving facts label, such as for small businesses or for small containers?**

Because the Beer Institute does not believe the proposed label format should be used under any circumstances, our response is limited to the general policy underlying this question. If TTB finds that information is sufficiently important to mandate its display on product labels, the size of an industry member should not warrant an exemption.

**6. If not mandatory for all alcohol beverage products, should the Serving Facts label be required at least on alcohol beverages that make certain calorie or carbohydrate claims?**

TTB has already addressed disclosure of caloric and carbohydrate information as discussed above in our responses to questions on light beer and carbohydrate claims in Notice No. 41, and the statement of average analysis currently required in conjunction

with calorie or carbohydrate claims is a sound approach. A statement of average analysis produced and presented in accordance with TTB Ruling 2004-1 provides consumers with the basic factual information necessary to make an informed decision to purchase or consume a particular product. Since the statement of average analysis would be submitted in advance for TTB review during the label application process, consumers will have a benefit that is not generally available in other food and beverage categories.

**7. What would be the costs associated with mandatory serving facts labeling to the industry and, ultimately, the consumer?**

Please see response to alcohol facts question beginning on page 27. As the question correctly suggests, significant costs would ultimately be borne by consumers, who would obtain little or no benefit from changes proposed in the alcohol beverage label formats in Notice No. 41.

**8. How might consumers benefit from such a label?**

The Beer Institute believes that the serving facts label containing any notion of “standard serving,” alcohol content in fluid ounces of absolute alcohol, or graphic depictions of drink glasses would be detrimental to consumers.

**9. As a consumer, how much extra would you be willing to pay for serving facts labeling information?**

While this question is not directed at alcohol beverage suppliers, the Beer Institute is not aware of any objective research indicating that consumers are actively seeking or desire information beyond that which is presently provided in the statement of average analysis that all alcohol beverage suppliers are now permitted to include on their

labels. Free consumer information is already widely available from the major domestic brewers and importers as well as many smaller brewers.

**10. Are there alternatives to mandatory serving facts labeling for alcohol beverages? For example, if a label lists a Web site or telephone number where a consumer could obtain such information about the product, would this be sufficient?**

Major brewer consumer hotlines and web-based e-mail systems were contacted over 300,000 times in 2004.<sup>48</sup> The Beer Institute recognizes that in a consumer base of approximately 90 million Americans, innumerable unique questions can arise, most of which cannot be accommodated on a label. Consumers with specific concerns already may utilize toll free phone numbers and e-mail to ascertain additional information of particular interest or importance. The contact information is already on many labels and can easily be obtained via an internet search.

**11. Should TTB allow a further breakdown of nutrients (for example, trans fat, sugars, fiber)?**

At this time, TTB should not permit the use of nutrients other than those on the existing statement of average analysis for the same policy reasons set forth in the preamble to the final regulations restricting health claims in labeling and advertising, and is cited above in our response to General Question 1 beginning on page 5.

**12. Does the use of ``standard drink'' and ``serving size'' on the same label create confusion? Does any confusion arise if a label specifies ounces of alcohol in conjunction with serving size and percent alcohol?**

Please see Introduction as well as responses to all alcohol facts label questions



beginning on page 27 and General Question 1 beginning on page 5, General Question 3 beginning on page 13, and General Question 4 beginning on page 15.

Each of these concepts is almost certain to mislead a significant number of consumers. As discussed above, TTB should exercise its statutory authority to prohibit publication of such misleading information on labels and in advertising and to prevent the harm that could result.

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<sup>1</sup> 27 U.S.C. § 205.

<sup>2</sup> E.g. Federal Alcohol Administration Act §§ 211(5), 211(6), and 211(7); Internal Revenue Code §§ 5002(a)(8), 5041, and 5052(a); U.S. American State Papers, Finance, 1:110-11; § 50 of the Act of July 1, 1862, 12 Stat. 432, 450; Sarlls v. U.S. 152 U.S. 570, 1894; Wexler v. Wirtz Corp., 211 Ill.2d 18, 809 N.E.2d 1240, (2004); 1 Wollen & Thornton, Law of Intoxicating Liquors, 21, 29-40; and Downard, William L., Dictionary of the History of the American Brewing and Distilling Industries, Westport, CT, Greenwood Press, 1980.

<sup>3</sup> ATF Rulings 76-1, 79-17, and 80-3; TTB Ruling 2004-1.

<sup>4</sup> ATF Ruling 80-3.

<sup>5</sup> United States Department of Agriculture and United States Department of Health and Human Services, 2005 Dietary Guidelines Advisory Committee Report, August 2004, available at <http://www.health.gov/dietaryguidelines/dga2005/report/>.

<sup>6</sup> 27 U.S.C. 205 (e) and (f).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Since 1986, the Beer Institute has commented at least fifteen times on TTB labeling and advertising proposals. A number of other proposals affecting other products were also considered in that same time frame, and as indicated throughout this comment, TTB has issued numerous rulings, industry circulars, and other documents including a labeling manual for each major industry segment.

<sup>10</sup> 26 U.S.C. §§ 5206 and 5301.

<sup>11</sup> 27 U.S.C. § 205(f).

<sup>12</sup> See Department of the Treasury and Department of Health and Human Services Report to the President and the Congress on Health Hazards Associated with Alcohol and Methods to Inform the General Public of these Hazards, November 1980.

<sup>13</sup> A.T.F.Q.B. 1985-2, p. 71; A.T.F. Notice 580, 51 F.R. 3208, January 24, 1986, and T.D. ATF-237, October 10, 1986.

<sup>14</sup> 27 U.S.C. § 205(e) and (f).

<sup>15</sup> Rubin v. Coors Brewing Co., 514 U.S. 476 at 491, (1995).

<sup>16</sup> P.L. 100-690, 27 U.S.C. 213-219a.

<sup>17</sup> 27 U.S.C. § 213.

<sup>18</sup> 27 CFR §§ 4.39, 4.64, 5.42, 5.65, 7.29, and 7.54.

<sup>19</sup> 68 F.R. 10101, March 3, 2003.

<sup>20</sup> See 21 CFR 101.13(q)(3)(ii): <http://www.cfsan.fda.gov/~lrd/cf101-13.html>. A summary of the rules for use of nutrient content claims can be found in Chapter VI of The Food Labeling Guide: <http://www.cfsan.fda.gov/~dms/flg-toc.html>. Examples of nutrient content claims can be found in Appendices A and B of The Food Labeling Guide: <http://www.cfsan.fda.gov/~dms/flg-6a.html> and <http://www.cfsan.fda.gov/~dms/flg-6b.html>.

<sup>21</sup> See e.g. 27 CFR § 7.54(c) and 27 CFR Parts 4, 5, and 7.

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<sup>22</sup> Center for Science in the Public Interest v. Department of the Treasury, 797 F.2d 995 (1986).

<sup>23</sup> On the subject of listing ingredients which are known to be allergens, Congress has mandated additional labeling requirements for all food and beverages. The purpose for allergen labeling of alcohol beverages and other food and beverages is to alert consumers to the presence of the most common food allergens. To comply with the ingredient labeling provisions of the Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA), the Beer Institute supports a straightforward extension of the current disclosure of specific allergens to the extent that they may be present in the finished product of any malt beverages or other alcohol beverages. That could be accomplished by simply adding the list of allergens enumerated in FALCPA to existing mandatory disclosures in 27 CFR Part 7 and the corresponding regulations for other alcohol beverage categories. The threshold issues and related technical matters should only be decided by TTB after the Food and Drug Administration provides basic guidance to industry. Those matters will be addressed in greater detail in a joint industry comment.

<sup>24</sup> 48 F.R. 45555, October 6, 1983 (emphasis added).

<sup>25</sup> See generally, 58 F.R. 10076-10106, March 3, 2003.

<sup>26</sup> Pelletier AL et al. 2004. Patients' understanding and use of snack food package nutrition labels, Journal of the American Board of Family Practice, 17:319-23.

<sup>27</sup> United State Department of Agriculture and United States Department of Health and Human Services, Nutrition and Your Health: Dietary Guidelines for Americans, Sixth ed., 2005.

<sup>28</sup> 27 U.S.C. § 205; 27 CFR §§ 4.36 and 5.37.

<sup>29</sup> 27 CFR § 7.71.

<sup>30</sup> 21 U.S.C. § 343(i), 21 CFR § 101.30.

<sup>31</sup> 21 CFR § 328.50.

<sup>32</sup> Code Ark. R. 006 02 001.

<sup>33</sup> Miss. Code Ann. § 27-71-509.

<sup>34</sup> ORS 471.448, OAR 845-010-0205

<sup>35</sup> See e.g. E.O. 13132, "Federalism," August 4, 1999 and White House Memorandum for Heads of Executive Departments and Agencies creating a Working Group on Federalism, February 21, 2001.

<sup>36</sup> 27 U.S.C. § 205(f).

<sup>37</sup> 27 CFR § 7.54(b) and corresponding sections applicable to wine and spirits labeling and advertising.

<sup>38</sup> 27 CFR 7.29(h) *Coverings, cartons, or cases*. Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement or any graphic pictorial, or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverages.

<sup>39</sup> TTB Ruling 2004-1, April 7, 2004.

<sup>40</sup> Exhibit B.

<sup>41</sup> 27 U.S.C. § 205(f).

<sup>42</sup> Beer Institute analysis of data from various industry sources.

<sup>43</sup> Beer Marketers Insights, 2005 Beer Industry Update, 2005, p. 111.

<sup>44</sup> Estimate based on survey of Beer Institute membership. This does not include general web site visits.

<sup>45</sup> Exhibit C.

<sup>46</sup> Information and program available at [www.centurycouncil.org](http://www.centurycouncil.org).

<sup>47</sup> United State Department of Agriculture and United States Department of Health and Human Services, Nutrition and Your Health: Dietary Guidelines for Americans, Sixth ed., 2005.

<sup>48</sup> Estimate based on survey of Beer Institute membership. Figure does not include general web site visits.